



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8  
999 18<sup>TH</sup> STREET - SUITE 300  
DENVER, CO 80202-2466  
<http://www.epa.gov/region08>

September 28, 2004

CERTIFIED MAIL #7003 2260 0001 7778 9609  
RETURN RECEIPT REQUESTED

Ref: 8ENF-W

James P. Daniels  
27160 470th Avenue  
Tea, SD 56074-8112

Re: Administrative Order for Compliance  
Docket No. **CWA-08-2004-0071**

Dear Mr. Daniels:

Based on our review of all available information, the United States Environmental Protection Agency (EPA) has determined that you, Daniels Construction, Inc., and Sunset Development, LLC are in violation of the Clean Water Act, as amended (CWA).

The CWA requires that an authorizing permit be obtained from the United States Army Corps of Engineers prior to the discharge of dredged or fill material into waters of the United States. See, 33 U.S.C. § 1311 and, for the definition of "waters of the United States," 33 CFR § 328.3. EPA has found that you, Daniels Construction, Inc., and Sunset Development, LLC have discharged dredged and fill material into waters of the United States without authorization under the CWA. These discharges have occurred at the Sunset Ridge subdivision in Lincoln County, South Dakota.

Consequently, EPA is issuing the enclosed administrative order, which specifies the nature of the violations and describes actions necessary for compliance with the CWA. EPA's authority for such action is provided under sections 308 and 309(a)(3) of the CWA, 33 U.S.C. §§ 1318 and 1319(a)(3). The order requires you to inform EPA in writing, within five days of receipt, of your intent to comply fully with the order.

The CWA requires EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the CWA authorizes a variety of possible enforcement actions, including issuing a civil and/or criminal action, an administrative penalty action, and/or an order for compliance. Please be advised that the issuance of this order does not preclude civil and/or criminal actions in U.S. District Court



pursuant to sections 309(b) or (c) of the CWA, 33 U.S.C. §§ 1319(b) or (c), or assessment of civil penalties pursuant to sections 309(d) or (g) of the CWA, 33 U.S.C. §§ 1319(d) or (g), for the violations cited in the order.

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an EPA enforcement activity pursuant to the Small Business Regulatory Enforcement and Fairness Act (SBREFA). SBREFA does not eliminate the responsibility to comply with the CWA or this order. We have enclosed a SBREFA information sheet containing further information on compliance assistance resources and tools available to small businesses.

Please review the order carefully. If you have any questions, the most knowledgeable people on my staff are Peggy Livingston, Enforcement Attorney, at 303-312-6858 and Monica Heimdal, Enforcement Officer, at 303-312-6359.

Sincerely,

**SIGNED**

Carol Rushin

Assistant Regional Administrator  
Office of Enforcement, Compliance  
and Environmental Justice

Enclosures

1. Administrative Order for Compliance
2. SBREFA Information Sheet

cc: Tina Artemis, EPA, Regional Hearing Clerk  
Howard Kenison, Attorney  
David L. Lagrone, U.S. Army Corps of Engineers  
John Miller, South Dakota Department of Environment and Natural Resources  
Steven Naylor, U.S. Army Corps of Engineers

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>Sunset Development, LLC</b>	)	<b>ADMINISTRATIVE ORDER FOR</b>
<b>27160 470<sup>th</sup> Ave.</b>	)	<b>COMPLIANCE</b>
<b>Tea, SD 57064-8112</b>	)	
	)	
<b>Daniels Construction, Inc.</b>	)	<b>Docket No. CWA-08-2004-0071</b>
<b>27160 470<sup>th</sup> Ave.</b>	)	
<b>Tea, SD 57064-8112</b>	)	
	)	
<b>James P. Daniels</b>	)	
<b>27160 470<sup>th</sup> Ave.</b>	)	
<b>Tea, SD 57064-8112</b>	)	
	)	
	)	
<b>Respondents.</b>	)	
_____	)	

**I. STATUTORY AUTHORITY**

This Administrative Order for Compliance (“Order”) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by sections 308 and 309(a) of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1318 and 1319(a). This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Order is based on the following findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which prohibits the discharge of pollutants into waters of the United States except as in compliance with, among other things, section 404 of the CWA, 33 U.S.C. § 1344.

## **II. FINDINGS OF VIOLATION**

1. Respondent Sunset Development, LLC (“Sunset Development”) is a limited liability company organized under the laws of the State of South Dakota. The address of the registered office for Sunset Development is 27160 470<sup>th</sup> Ave., Tea, SD 57064-8112. Its registered agent at that address is James P. Daniels.
2. Respondent Daniels Construction, Inc. (“Daniels Construction”) is a corporation incorporated under the laws of the State of South Dakota. The address of the registered office for Daniels Construction is 27160 470<sup>th</sup> Ave., Tea, SD 57064-8112. Its registered agent at that address is Jim (James P.) Daniels.
3. Respondent James P. Daniels (“Daniels”) is an individual who at all relevant times has been the manager of Sunset Development and the president and a director of Daniels Construction.
4. The Respondents are engaged in real estate development in the State of South Dakota.
5. Daniels Construction also has done business under the name of “Sunset Ridge,” under which it, along with Sunset Development and Daniels, has been engaged in developing a residential subdivision known as the “Sunset Ridge Addition,” as the “Taylor Ridge Addition,” and/or as “Sunset Ridge.” In this Order, this subdivision will be referenced as the “Site.”
6. The Site is located in the east half of section 7, Township 100 North, Range 50 West, in Lincoln County, South Dakota.
7. The Respondents have owned, controlled, and/or operated the Site at all times relevant to this proceeding.
8. Prior to construction, the Site contained several water bodies, including a 0.4-acre wetland, a 0.6-acre wetland, and a linear waterway bordered by 3.0 acres of wetlands. Prior to

construction, the two smaller wetlands were connected by surface water and were tributaries of, and adjacent to, the linear waterway.

9. The linear waterway is an unnamed tributary to the Big Sioux River. The Big Sioux River flows into the Missouri River. Both the Big Sioux River and the Missouri River are navigable, interstate waters.
10. On April 4, 2001, a consultant retained by the Respondents wrote to the South Dakota Regulatory Office of the United States Army Corps of Engineers (“Corps”) regarding whether the wetlands at the Site were subject to CWA jurisdiction.
11. On May 23, 2001, the Corps determined that the wetlands described in paragraph 8 of Section II of this Order were “waters of the United States” subject to the jurisdiction of the CWA.
12. On June 12, 2001, the Corps notified the Respondents’ consultant that the 0.4-acre wetland, the 0.6-acre wetland, and the linear waterway and its associated 3.0 acres of wetlands referenced in paragraph 8 of Section II of this Order were connected to a surface water drainage system that flows into the Big Sioux River.
13. The Corps’ June 12, 2001, letter also provided the Respondents’ consultant with an application form for a Department of the Army permit authorizing the discharge of dredged or fill material into waters of the United States.
14. On or about August 3, 2001, the Respondents’ consultant, on behalf of Sunset Development, submitted a permit application to the Corps seeking authorization to fill four (4) acres of wetlands at the Site.
15. By letter dated September 7, 2001, the Corps acknowledged receipt of the permit application from the Respondents’ consultant, stating at the close of its letter that “THIS

ACKNOWLEDGEMENT OF RECEIPT OF YOUR APPLICATION DOES NOT  
AUTHORIZE COMMENCEMENT OF WORK ACTIVITY.” [Emphasis in original]

16. On September 14, 2001, the Corps and the South Dakota Department of Environment and Natural Resources (SDDENR) issued a “Joint Notice of Permit Pending, soliciting comments from the public on the impacts of the activity covered by Sunset Development’s permit application.
17. By letter dated January 15, 2002, the Corps notified Respondents’ consultant that after considering comments from the public, the Corps had determined that the Respondents’ proposed wetland mitigation plan would not adequately replace the lost functions of the existing small wetland basins and the linear wetland. The Corps advised that the consultant submit a supplemental or revised mitigation plan.
18. On May 14, 2004, the Respondents’ consultant submitted a revised wetland mitigation plan to the Corps.
19. On June 2, 2004, the Corps conducted an inspection on the Site for the purpose of evaluating the proposed mitigation plan that had been submitted on May 14, 2004.
20. During its June 2, 2004, inspection, the Corps found that the Respondents had discharged or allowed the discharge of fill material into the 0.4-acre and 0.6-acre wetlands referenced in paragraph 8 of Section II of this Order. The Corps also found that Respondents had discharged or allowed the discharge of dredged and/or fill material into a portion of the linear waterway and its associated wetlands referenced in paragraph 8 of Section II of this Order.
21. Aerial photographs demonstrate that the 0.6-acre wetland and portions of the linear waterway were filled some time prior to April 26, 2001, and that by May 3, 2002, the 0.4-acre wetland had been filled and the linear waterway had been further impacted.

22. The discharges described in paragraphs 20 and 21 of Section II of this Order resulted in the elimination of the 0.4-acre and the 0.6-acre wetlands and in adverse impacts to portions of the linear waterway and its associated wetlands. The wetlands and linear waterway provided various functions and values including aquatic and wildlife habitat, water quality enhancement, ground water recharge, flood flow attenuation, and aesthetics.
23. The discharges described in paragraphs 20 and 21 of Section II of this Order were performed using common earthmoving vehicles and equipment, which were operated by Respondents or by somebody on behalf of Respondents.
24. Each Respondent is a “person” within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).
25. The discharged dredged and fill materials referenced in paragraphs 20 and 21 of Section II of this Order are “dredged material” and “fill material” within the meaning of 33 CFR § 323.2(c) and 33 CFR § 323.2(e), respectively, and “pollutants” within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).
26. The vehicles and equipment described in paragraph 23 of Section II of this Order are each a “point source” as that term is defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).
27. The wetlands and the unnamed tributary to the Big Sioux River referenced in paragraphs 8 and 9 of Section II of this Order are “waters of the United States” within the meaning of 33 CFR § 328.3(a) and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).
28. The placement of dredged and fill material into the wetlands and into the unnamed tributary to the Big Sioux River constitutes the “discharge of pollutants” within the meaning of

section 502(12) of the CWA, 33 U.S.C. § 1362(12).

29. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with, among other things, section 404 of the CWA, 33 U.S.C. § 1344.
30. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters, which are defined as waters of the United States.
31. 33 CFR § 323.3(a) specifies that, unless exempted pursuant to 33 CFR § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.
32. Respondents are not and never have been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredged and/or fill material to any waters of the United States on the Site.
33. Respondents' discharges of dredged and/or fill material at the Site violate section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each discharge of pollutants from a point source by Respondents into waters of the United States without authorization by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).
34. Mitigation for the adverse impacts to, and the loss of the functions and values of, waters of the United States on the Site can be achieved as a practical matter through commonly used



methods of construction, digging, revegetation, and best management practices.

35. Activities to be carried out under this Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a). Mitigation is appropriate to address the actual and potential harm to water quality, aquatic habitat, and wildlife habitat, as well as other functions and values, caused by Respondents' unpermitted activities.
36. This Order was issued after consultation and coordination with the Corps' Omaha District.

### **III. ORDER**

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED:

1. Respondents shall immediately terminate all unauthorized discharges of dredged or fill material, now and in the future, into waters of the United States, unless specifically authorized by the Corps under a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. This prohibition includes all mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in a discharge of dredged or fill material into waters of the United States.
2. Respondents shall conduct mitigation activities, as more fully described below, for impacts to waters of the United States resulting from the unauthorized discharges of dredged and fill

material at the Site. No less than three (3) acres of mitigation shall be realized for each acre of impact (a 3:1 ratio).

3. Within five (5) calendar days of receipt of this Order, Respondents shall inform EPA in writing of their intent to fully comply with the Order. EPA requests that Respondents meet with EPA within fourteen (14) calendar days of issuance of this Order if the Respondents have concerns or questions about the requirements of the Order. The scheduling of such a meeting shall not alter Respondents' responsibility to meet any of the deadlines specified in this Order unless otherwise clearly stated in a written communication to them by EPA.
4. All mitigation activities shall be conducted in accordance with an EPA-approved mitigation plan prepared by a consultant experienced in wetland and stream mitigation and restoration. The consultant also shall directly supervise all work performed pursuant to the EPA-approved mitigation plan. A statement of the consultant's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.
5. All mitigation activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in wetland and stream mitigation and restoration. A statement of the equipment operator's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.
6. Within forty-five (45) calendar days of receipt of this Order, Respondents shall submit to EPA for review, comment, and approval a mitigation plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, for mitigation of the impacts to waters of the United States resulting from the unauthorized discharges of dredged or fill material on

the Site.

7. The mitigation plan shall be prepared in accordance with “U.S. Environmental Protection Agency - Region VIII Section 404 Enforcement: General Guidelines for Removal and Restoration Plans,” attached hereto as Exhibit A. In addition, the mitigation plan shall include:
  - a. A complete assessment of the impacts to the Site due to the Respondents’ discharges of dredged and/or fill material at the Site.
  - b. A detailed work plan and schedule for all of the work and activities to be accomplished by the mitigation plan, including the application for any required permits, providing for completion of all aspects of the mitigation work no later than sixty (60) days after EPA approves the mitigation plan;
  - c. Locations and delineations of all wetlands and other waters of the United States included in the mitigation. The delineations shall be performed in accordance with the procedures in the “Corps of Engineers Wetlands Delineation Manual, January 1987 - Final Report,” including the procedures for atypical situations, and subsequent interpretive guidance published by the Corps;
  - d. Grading, planting, and monitoring plans, measurable criteria for success of mitigation, and provisions for proper disposal of any excess soils or other materials generated during construction and/or restoration;
  - e. Detailed professional drawings of the mitigation site(s), including plan and profile drawings with control elevations for current conditions and, if different, proposed conditions.
  - f. A description of all costs to complete the mitigation work, including the costs of all

consultations, permits, construction, monitoring, land acquisition, etc.

8. EPA will review the mitigation plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the mitigation plan, Respondents shall, within fifteen (15) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.
9. Respondents must make a timely application for each permit necessary to implement the EPA-approved plan and for conducting mitigation in accordance with the approved plan, including the schedule specified therein, with all granted permits, and with all applicable laws. Respondents must demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.
10. This Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondents shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA. If any such permit is required, Respondents shall obtain such permit(s) and provide a copy or copies to EPA pursuant to paragraph 9 of Section III of this Order prior to initiating any work that is to be performed pursuant to this Order.

U.S. Army Corps of Engineers  
South Dakota Regulatory Office  
28563 Powerhouse Road, Room 118  
Pierre, SD 57501  
Telephone: 605-224-8531

11. Respondents shall submit three (3) copies of the mitigation plan, all notifications, and related correspondence to:

Monica Heimdal, 8ENF-W  
U.S. Environmental Protection Agency, Region 8  
999 18th Street, Suite 300  
Denver, CO 80202-2466  
Telephone: 303-312-6359  
Facsimile: 303-312-6409

A copy of the mitigation plan, all notifications, and related correspondence shall also be provided to:

Peggy Livingston, 8ENF-L  
U.S. Environmental Protection Agency, Region 8  
999 18th Street, Suite 300  
Denver, CO 80202-2466  
Telephone: 303-312-6858  
Facsimile: 303-312-6953

12. All plans (including, but not limited to, the mitigation plan), deliverables, reports, specifications, schedules, or attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved plans, deliverables, reports, specifications, schedules, or attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.
13. Respondents shall allow, or use their best efforts to allow, access by any authorized representatives of EPA or its contractors, the Corps, the SDDENR, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, and the South Dakota Department of Game, Fish, and Parks, upon proper presentation of credentials, to sites and records relevant to this Order for any of the following purposes:
  - a. To inspect and monitor progress of the activities required by this Order;
  - b. To inspect and monitor compliance with this Order; and
  - c. To verify and evaluate data and other information submitted to EPA.

14. This Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the site(s), conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.
15. This Order shall be effective upon receipt by any of the Respondents.
16. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$27,500 per day for each violation that occurred before March 15, 2004, and \$32,500 per day for each violation thereafter of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 1319(a). Additionally, section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA. Further, section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA.
17. Issuance of this Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for violations giving rise to the Order.
18. Compliance with the terms and conditions of the Order shall not be construed to relieve Respondents of their obligation to comply with any applicable Federal, state, or local law or regulation.
19. Failure by Respondents to complete the tasks described herein in the manner and time frame specified pursuant to this Order may subject them to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

DATED this 25<sup>TH</sup> day of September, 2004.

**SIGNED**

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Carol Rushin  
Assistant Regional Administrator  
Office of Enforcement, Compliance  
and Environmental Justice

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE  
REGIONAL HEARING CLERK.**

**THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON SEPTEMBER 28, 2004.**

